SEE CHOO

v.

SURUHANJAYA SEKURITI

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
MOHD GHAZALI YUSOFF JCA
NIK HASHIM JCA
[CIVIL APPEAL NO: J-02-403-2001]
25 JANUARY 2005

WORDS & PHRASES: *'relevant person' - Securities Industry Act 1983, s. 53 - Whether stock-broking company within such definition - Whether merchant banker within such definition*

WORDS & PHRASES: *'such other person' - Securities Industry Act 1983, s. 53 - Whether the KLSE would fall within definition of 'such other person'*

SECURITIES: *Securities legislation - Securities Industry Act 1983 - Sections 53 & 54 - Construction of*

SECURITIES: *Securities legislation - Securities Industry Act 1983 - Sections 53 - 'such other person' - Definition of*

STATUTORY INTERPRETATION: *Construction of statutes - Conjunctive or disjunctive - Securities Industry Act 1983, s. 53*

SECURITIES: *Securities Commission - Powers, duties and discretion of - Power to appoint independent auditor - When exercisable - Securities Industry Act 1983, s. 53*

ADMINISTRATIVE LAW: *Remedies - Certiorari and mandamus - Nothing wrong or illegal or irrational with decision making process of respondent - Nothing to show that respondent acted improperly or in any unauthorized manner - Whether High Court ought to exercise discretion in granting orders sought*

The appellant was the holder of several share trading accounts with JB Securities Sdn Bhd ('JBSSB'). Financing facilities were provided by Arab-Malaysian Merchant Bank Bhd ('AMIM') through a margin facility account. The appellant claimed to have discovered irregularities in her trading accounts. She thus wrote, through her solicitors, to the respondent (the Securities Commission) requesting that the respondent appoint an independent auditor to audit *inter alia* JBSSB's and AMIM's 'books, accounts, and records'. In

response, the respondent requested the Kuala Lumpur Stock Exchange ('the KLSE') to audit the said trading accounts and to send the results to the respondent. Through numerous letters by her solicitors the appellant voiced her unhappiness over such an appointment. Through a letter dated 3 September 1998 to the appellant's solicitors, the respondent stated that it had exercised its discretion under s. 53 of the Securities Industry Act 1983 ('the SIA') by appointing the KLSE to conduct the audit on JBSSB under the said section. The respondent also pointed out that AMIM was not a relevant person or body upon which an audit could be carried out under s. 53. The respondent further requested the solicitors to forward a statutory declaration by the appellant on the matter as required under s. 53(3) of the SIA. By letter dated 15 October 1998 the respondent informed the appellant's solicitors that an investigation would be conducted on the complaint to verify whether the appellant had good reasons for making the application as required under s. 53(4) of the Act. An investigation report prepared by the respondent eventually revealed that the appellant's trading accounts were in order and therefore the appellant had no good reason to apply for an independent auditor under s. 53 SIA 1983. Accordingly, the respondent refused the appellant's application for the appointment of an independent auditor. The appellant thus applied to the High Court for an order of *certiorari* to quash the decision of the respondent in rejecting the appellant's application to appoint an independent auditor to audit the accounts of JBSSB and for *mandamus* to compel the respondent to appoint an independent auditor to audit the said accounts. The application was however dismissed. On appeal to the Court of Appeal, counsel for the appellant contended, *inter alia*: (i) that the respondent having initially exercised its discretion pursuant to s. 53 of the SIA in appointing KLSE to look into the complaint, could not later reject the appellant's application for the appointment of an independent auditor; (ii) having appointed the KLSE to make the necessary investigations under s. 53 of the SIA, the respondent was caught by s. 54 of the SIA which required the independent body concerned, and not the respondent, to report in respect of the conclusions of such investigations.

Held (dismissing the appeal with costs)
Per Mohd Ghazali Yusoff JCA:

[1] JBSSB, a stock-broking company and a 'dealer', would fall within the contemplation of the words 'relevant person' found under s. 53 of the SIA. AMIM being a merchant bank, did not fall within the purview of the words 'relevant person'. (p 39 b-c)

[2] The appointment of KLSE by the respondent to audit the trading accounts was in order and in accordance with s. 53 of the SIA. Section 53(1) of the SIA clearly empowers the respondent to appoint 'an independent auditor' or 'such other person' or 'body of persons' as the respondent may decide. The KLSE certainly falls within the contemplation of the words 'such other person'. The word 'or' appearing in s. 53(1) denotes that those words have to be read disjunctively. The term 'an independent auditor' cannot be used interchangeably with the terms 'such other person' or 'body of persons'. An 'auditor' cannot be equated with the words 'or such other person' or 'body of persons'. The respondent decided to appoint the KLSE and not 'an independent auditor'. The respondent did not at any time make a decision to appoint 'independent auditors' as contended by the appellant's counsel. Hence, there was no question of the respondent having no jurisdiction to reconsider or reverse its earlier decision. That question did not arise at all. (pp 41 a-h & 42 a-h)

[3] There was no merit in the argument of the appellant that having appointed the KLSE to carry out the audit, the respondent was caught by s. 54 of the SIA. By virtue of s. 53(4) the respondent could not, *inter alia*, appoint an independent auditor unless it was satisfied that the applicant had good reasons for making the application. The only way the respondent could comply with s 53(4) was to verify the application by making its own inquiries relating to the said trading accounts and the 'irregular' transactions complained of. The respondent carried out its own 'investigation' to satisfy itself of the veracity of the application for an independent auditor to be appointed. It did not carry out an audit. As such, there was no relevance for the application of s. 54 of the SIA. The argument canvassed by the appellant that the respondent had no jurisdiction to reconsider its earlier decision to appoint 'independent auditors' did not hold water. The respondent never appointed 'an independent auditor' at any time. (pp 43 a-g & 49 b)

[4] On the facts, the respondent had acted *bona fide*, fairly and honestly. There were no grounds of review upon which the High Court could have granted the order of *certiorari* applied for. There was nothing wrong or illegal or irrational with the decision making process of the respondent. In relation to the order of *mandamus* applied for, there was nothing to show that the respondent had acted improperly or in any unauthorised manner. Under the circumstances, the respondent had exercised its discretion in a manner which was in accord with the intention of the SIA. The High Court was right in declining to exercise its discretion to make the orders of *certiorari* and *mandamus* and as such the appeal ought to be dismissed with costs. (pp 49 d-h & 50 e)

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu adalah pemegang beberapa akaun perniagaan saham dengan JB Securities Sdn Bhd ('JBSSB'). Kemudahan kewangan bagi perniagaan tersebut telah diberikan oleh Arab-Malaysian Merchant Bank Bhd ('AMIM') melalui satu akaun kemudahan margin. Perayu berkata bahawa terdapat ketidakteraturan dalam akaun perniagaannya. Beliau kemudian menulis, melalui peguamnya, kepada responden meminta responden melantik juru-audit bebas untuk mengaudit antara lain 'buku-buku, akaun-akaun dan rekod-rekod' JBSSB dan AMIM. Responden membalas dengan meminta Bursa Saham Kuala Lumpur ('KLSE') mengauditkan akaun-akaun perniagaan tersebut dan melaporkan keputusannya kepada responden. Melalui surat-surat yang dihantar oleh peguamnya, perayu merakamkan rasa tidak puas hati dengan perlantikan oleh responden tersebut. Melalui surat bertarikh 3 September 1998 kepada peguam perayu, responden menyatakan bahawa ia telah melaksanakan budi bicaranya di bawah s. 53 Akta Perindustrian Sekuriti 1983 ('SIA') apabila melantik KLSE untuk melakukan audit terhadap JBSSB. Responden juga menyatakan bahawa AMIM bukanlah sebuah badan yang relevan di mana audit terhadapnya boleh dibuat di bawah s. 53. Responden seterusnya meminta peguam perayu untuk mengemukakan akuan berkanun oleh perayu tentang halperkara yang berbangkit selaras dengan kehendak s. 53(3) SIA. Melalui surat bertarikh 15 Oktober 1998, responden memberitahu peguam perayu bahawa satu penyiasatan akan dilakukan ke atas aduan di bawah s. 53(4) bagi mempastikan sama ada perayu mempunyai alasan kukuh untuk membuat permohonannya. Laporan penyiasatan yang disediakan oleh responden akhirnya menunjukkan bahawa akaun-akaun perniagaan perayu adalah dalam keadaan teratur dan oleh kerana itu perayu tiada alasan kukuh untuk memohon mendapatkan juru-audit bebas di bawah s. 53 SIA. Responden dengan itu menolak permintaan perayu untuk melantik juru-audit bebas. Akibatnya perayu memohon perintah *certiorari* dari Mahkamah Tinggi bagi membatalkan keputusan responden menolak permohonannnya untuk melantik juru-audit bebas bagi mengaudit akaun JBSSB, serta perintah mandamus bagi memaksa responden melantik juru-audit bebas guna mengaudit akaun-akaun tersebut. Permohonan perayu bagaimanapun telah ditolak. Ketika rayuan di Mahkamah Rayuan, peguam perayu berhujah, antara lain: (i) bahawa responden selepas melaksanakan budi bicaranya di bawah s. 53 SIA dan melantik KLSE untuk menyiasat aduan, tidak boleh kemudiannya menolak permohonan perayu untuk perlantikan juru-audit bebas; (ii) bahawa, setelah melantik KLSE untuk membuat penyiasatan di bawah s. 53 SIA, responden tertakluk kepada s. 54 yang mengkehendaki supaya laporan dibuat oleh badan bebas tersebut, dan bukannya oleh responden, berkaitan rumusan-rumusan yang diperolehi dari penyiasatan itu.

Diputuskan (menolak rayuan)
Oleh Mohd Ghazali Yusoff HMR:

[1] JBSSB, sebagai sebuah syarikat stock-broking dan seorang 'dealer' adalah dirangkumi oleh oleh perkataan-perkataan 'orang yang relevan' yang terdapat dalam s. 53 SIA. Manakala AMIM, yang merupakan sebuah bank dagang, tidak tertakluk kepada perkataan-perkataan 'orang yang relevan' itu.

[2] Perlantikan KLSE oleh responden untuk mengaudit akaun-akaun perniagaan adalah teratur dan selaras dengan peruntukan s. 53 SIA. Seksyen 53(1) SIA jelas memberi kuasa kepada responden untuk melantik 'seorang juru-audit bebas' atau 'mana-mana orang lain' atau 'sekumpulan orang' mengikut apa yang diputuskan oleh responden sendiri. KLSE tentunya termasuk dalam ungkapan 'mana-mana orang lain'. Perkataan 'atau' di s. 53(1) menunjukkan bahawa ungkapan-ungkapan di atas hendaklah dibaca secara disjunktif. Ungkapan 'seorang juru-audit bebas' tidak boleh digunakan secara bertukar ganti dengan ungkapan 'atau mana-mana orang lain' mahupun dengan ungkapan 'sekumpulan orang'. Seorang 'juru-audit' tidak boleh disamakan dengan perkataan 'atau mana-mana orang lain' atau 'sekumpulan orang'. Responden memutuskan untuk melantik KLSE dan tidak 'seorang juru-audit bebas'. Responden tidak pernah pada bila-bila masa pun melantik 'juru-audit-juru-audit bebas' sebagaimana yang dikatakan oleh peguam perayu. Oleh yang demikian, tidak timbul persoalan responden tidak berbidang kuasa untuk menimbang semula atau mengakas keputusannya yang terdahulu. Persoalan tersebut langsung tidak berebangkit.

[3] Tiada merit di dalam hujah perayu bahawa responden, setelah melantik KLSE sebagai juru-audit untuk melakukan pengauditan, dirangkumi oleh s. 54 SIA. Berdasarkan s. 53(4), responden antara lain tidak boleh melantik juru-audit bebas kecuali ia berpuas hati bahawa pemohon mempunyai sebab-sebab kukuh dalam membuat permohonan. Satu-satunya cara responden boleh mematuhi s. 53(4) adalah dengan memeriksa permohonan dan membuat siasatan-siasatannya sendiri berkaitan akaun-akaun perniagaan tersebut serta transaksi-transaksi 'tidak teratur' yang diadukan itu. Responden telahpun menjalankan 'siasatannya' sendiri untuk memuaskan hatinya tentang kekukuhan permohonan untuk perlantikan juru-audit bebas. Ia tidak menjalankan sebarang pengauditan. Oleh itu, pemakaian s. 54 SIA adalah sama sekali tidak relevan. Hujah yang dibangkit perayu bahawa responden tidak berbidang kuasa untuk mempertimbangkan semula

keputsan awalnya untuk melantik 'juru-audit bebas' adalah tidak berasas. Responden pada bila-bila masapun tidak pernah melantik 'seorang juru-audit bebas'.

[4] Berdasarkan fakta, responden telah bertindak secara *bona fide*, adil dan jujur. Tidak ada alasan untuk semakan semula membolehkan Mahkamah Tinggi mengeluarkan perintah *certiorari*. Proses membuat keputusan responden juga tidak boleh dikatakan sebagai salah, tak sah atau tak rasional. Berkaitan permohonan untuk *mandamus*, tiada apapun yang menunjukkan bahawa responden telah bertindak secara di luar aturan atau dengan cara yang tidak dibenarkan. Dalam halkeadaan sedemikian, responden telah melaksanakan budi bicaranya secara yang bersesuaian dengan kehendak SIA. Hakim Mahkamah Tinggi betul apabila enggan melaksanakan budi bicaranya untuk membuat perintah-perintah *certiorari* dan *mandamus* yang dipohon dan rayuan harus ditolak dengan kos.

Case(s) referred to:
Michael Lee Fook Wah v. Minister of Human Resources Malaysia & Anor [1998] 1 CLJ 227 CA ***(refd)***
Non-Metallic Mineral Products Manufacturing Employees Union & Ors v. South East Asia Fire Bricks Sdn Bhd [1976] 2 MLJ 67 ***(refd)***
R Rama Chandran v. The Industrial Court of Malaysia [1997] 1 CLJ 147 FC ***(refd)***

Legislation referred to:
Securities Industry Act 1983, ss. 53, 54

For the appellant - Gobind Singh Deo; M/s Karpal Singh & Co
For the respondent - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co

[Appeal from High Court, Johor Bahru; Originating Motions No: 25-24-1999]

Reported by Andrew Christopher Simon

JUDGMENT

Mohd Ghazali Yusoff JCA:
This is an appeal against the decision of the High Court, Johor Bahru wherein the appellant's application for the issue of orders of *certiorari* and *mandamus* were refused. The background leading to the application is as follows:

By letter dated 20 March 1998, Messrs Yeo & Chin, a legal firm acting on behalf of the appellant (hereafter referred to as the appellant's solicitors") requested the respondent, the Securities Commission to appoint an independent auditor pursuant to s. 53 of the Securities Industry Act 1983 ("the Act"). It was stated therein that the appellant is the holder of "trading accounts 3SE035,

8SE035 and 2 AM033 (AMIM margin facility account #2000-000886-9, opened since December 1992)" with JB Securities Sdn Bhd ("JBSSB"), a stockbroking company (hereafter referred to collectively as "the said trading accounts"). The appellant claimed she discovered irregularities in the said trading accounts and hence request that the respondent appoint an independent auditor to audit JBSSB and Arab-Malaysian Merchant Bank Berhad's ("AMIM") "books, accounts, records and particularly amendment of contracts relating to our client's aforesaid accounts so that public interest might be served and transparency in this financial industry might restore investors' confidence".

Section 53 of the Act entitled "Power of Commission to appoint an independent auditor, etc., upon application of applicant" reads:

> (1) Upon receipt of an application in writing from a person who alleges that a relevant person has failed to account to the Commission in respect of any monies or securities held or received by that relevant person for or on his behalf, the Commission may appoint in writing an independent auditor or such other person or body of persons as the Commission may decide to examine, audit and report either generally or in relation to any particular matter upon the books, accounts and records of and securities held by that relevant person.
>
> (2) Every application under subsection (1) shall state:
>
> (a) particulars of the circumstances under which the relevant person received the monies or securities in respect of which he is alleged to have failed to account;
>
> (b) particulars of those monies or securities and of the transactions of the applicant and the relevant person relating thereto; and
>
> (c) such other particulars as the Commission may require.
>
> (3) Every statement in any such application shall be verified by a statutory declaration made by the applicant and shall, if made bona fide and without malice, be privileged.
>
> (4) The Commission shall not appoint an independent auditor, person or body of persons under subsection (1) unless the Commission is satisfied:
>
> (a) that the applicant has good reason for making the application; and
>
> (b) that it is expedient in the interests of the relevant person or the applicant or the general public that the books, accounts and records of and securities held by the relevant person should be examined, audited and reported upon.

Section 48(2) of the Act reads:

> A reference to a relevant person in this Division shall be construed as a reference to a dealer, a fund manager, a stock exchange or a recognised clearing house.

Section 2 of the Act provides as follows:

> 'auditor' means an approved company auditor within the meaning of the Companies Act 1965;

In response to that letter sent by the appellant's solicitors, the respondent by letter dated 29 June 1998 addressed to the Kuala Lumpur Stock Exchange ("KLSE") requested the KLSE to audit the said trading accounts and to report the results to the respondent.

The appellant was not too happy with that development and voiced out her unhappiness. By letter dated 14 July 1998, the appellant's solicitors informed the respondent that appointing the KLSE as an independent auditor "would greatly prejudice our client's interests since KLSE shall not and cannot be regarded as an independent auditor" and as such "we shall be much obliged if you can expedite the matter and appoint an independent auditor as soon as possible". About two weeks later, by letter addressed to the respondent dated 27 July 1998, the appellant's solicitors again insisted that the KLSE is "not qualified to be an 'independent auditor'" under s. 53 of the Act and urged the respondent to take immediate action "for the relevant appointment".

By letter dated 31 July 1998, the respondent informed the appellant's solicitors that "your client may liaise with the KLSE to appoint another independent auditor under its KLSE Rules & Regulations". In response to that, the appellant's solicitors, by letter dated 31 July 1998, informed the respondent, *inter alia*, as follows:

(a) that pursuant to s. 53 of the Act, "it is your authority to appoint an 'independent auditor' upon application of our client";

(b) that it is not proper for the appellant to liaise with the KLSE for the relevant appointment;

(c) that the KLSE "shall not and cannot be regarded as an 'independent auditor'".

By letter dated 26 August 1998, the appellant's solicitors wrote to the respondent as follows:

Dear Sirs,

Re: APPLICATION TO APPOINT AN INDEPENDENT AUDITOR

We refer to our numerous letters in respect of the above matter.

We are instructed to inform you as follows:

(1) It is the clear provision of the Securities Industry Act 1983 ("the Act") that empower you to appoint an independent auditor upon application of our client;

(2) It is absolutely improper for you to appoint KLSE to audit and examine our client's accounts in AMIM and Johor Bahru Securities Sdn Bhd since KLSE shall not be considered as an "auditor" as defined under the Act itself;

(3) Your further delay in this matter is really disappointed (sic) and our client's interests would be adversely affected and prejudiced.

Therefore, please let us have your immediate reply by today as to whether you would exercise your authority to appoint an independent auditor under the meaning of s. 53 otherwise we have no other alternative but to report the same to Ministry of Finance.

Upon receipt of the above letter, the respondent, by letter dated 3 September 1998, replied as follows:

Dear Sir,

Re: APPLICATION TO APPOINT INDEPENDENT AUDITOR PURSUANT TO SECTION 53 OF THE SECURITIES INDUSTRY ACT 1983

We refer to your letter dated August 26, 1998 regarding the above matter.

Please note that under section 53 of the Securities Industry Act 1983 (hereinafter shall be referred to as SIA), the Commission is empowered to appoint an independent auditor or such other person or body of persons to conduct an audit or examination on a relevant person, as it thinks fit.

Relevant person as defined in the SIA, shall be construed as a reference only to a dealer, a fund manager, a stock exchange or a recognised clearing house. AMIM therefore does not fall within the aforesaid definition of a relevant person.

In this regard, the Commission has exercised its discretion under section 53 of the SIA by appointing the Kuala Lumpur Stock Exchange (KLSE) to conduct the audit on JB Securities under the said section.

> In order to assist the KLSE in this matter, please forward to us a statutory declaration by your client, Madam See Choo on the matter stated in your letter dated March 20, 1998 as required under section 53(3) of the SIA.

By letter dated 10 September 1998 the appellant's solicitors forwarded a copy of the statutory declaration as requested by the respondent and reiterated the appellant's reservations about the appointment of the KLSE to conduct the audit of JBSSB in the following manner:

> ... instead of appointing KLSE we are instructed to make application to you so that an independent auditor can be appointed. Alternatively, our client request that an independent auditor shall be appointed either by your goodselves or our client to coordinate with the duties of KLSE to co-audit the books of JB Sec.
>
> Kindly note that "auditor" has been defined as an approved company auditor within the meaning of the Companies Act 1965.

The appellant's statutory declaration, dated 10 September 1998, read as follows:

STATUTORY DECLARATION

> I, SEE CHOO @ SEE GUAT KIOK (NRIC NO. 2249756) of No. 8, Jalan Permatang 5, Kempas Baru, 81200 Johor Bahru do hereby declare and represent as follows:
>
> 1. I am holder of trading accounts (no. 3SE035, 8SE035 and 2AM033) {AMIM margin facility account no. 2000-000886-9, opened since December 1992} in JB Securities Sdn Bhd (hereinafter referred to as "JB Sec").
>
> 2. I have instituted a civil suit against Arab-Malaysian Merchant Bank Berhad through JB High Court Civil Suit No. 22-43-1996 for late credits and unauthorised cash withdrawals.
>
> 3. Pending the trial of the above High Court case, I have through M/s Yeow & Chin, my solicitors made an application to Securities Commission to appoint an independent auditor pursuant to the provision of S.53 of the Securities Industry Act 1983 ("SIA 1983") to audit JB Sec's books, accounts, records and particularly amendments of contracts relating to my aforesaid accounts *vide* letter of M/s Yeow & Chin dated 20th March, 1988 ("the said letter").
>
> 4. I have set out all the reasons in the said letter for the relevant application to the Securities Commission and verily believe that all the contents are true to my best knowledge. A copy of the said letter is exhibited herewith and marked as exhibit "SC-1".

AND I make this solemn declaration conscientiously believing the same to be true and by virtue of the provisions of the Statutory Declaration Act, 1960.

By letter dated 15 October 1998 the respondent informed the appellant's solicitors that they will conduct an investigation on the complaint to verify as to whether the appellant has good reason for making the application as required under s. 53(4) of the Act. That letter reads:

Tuan,

ADUAN DARI PUAN SEE CHOO @ SEE GUAT KIOK

Kami merujuk kepada surat-surat/faks dari pihak tuan berhubung dengan permohonan dari anakguam tuan untuk memohon perlantikan juruaudit bebas di bawah Seksyen 53 Akta Perindustrian Sekuriti 1983 (Securities Industry Act 1983).

Adalah dimaklumkan bahawa pihak kami akan menjalankan suatu siasatan berhubung dengan perkara tersebut bagi memastikan kesahihan aduan/dakwaan dan sejauhmanakah keseriusan kes tersebut sebelum permohonan tersebut boleh dipertimbangkan seperti yang dinytakan di bawah Seksyen 53(4)(a) Akta yang sama.

Sekian dimaklumkan, terima kasih.

It would be appropriate to mention here that the evidence showed that the respondent had, even prior to the first letter written by the appellant's solicitors dated 20 March 1998, discussed earlier, acted upon a letter written by the appellant's solicitors and addressed to Messrs Brockett & Cho, solicitors for JBSSB and which was copied to the respondent. That letter, dated 9 February 1998, illustrated that the appellant had requested JBSSB for particulars of the said trading accounts especially regarding 50,000 shares of Megafirst Corp Bhd which she alleged were amended by JBSSB.

Upon receipt of that letter, which as discussed earlier, was only copied to the respondent, the respondent wrote to Messrs Brockett & Cho and received a copy of a detailed explanation of the transactions conducted under the said trading accounts which was sent earlier to the appellant's solicitors.

Not satisfied with that explanation from JBSSB's solicitors, the appellant through her solicitors wrote that letter dated 20 March 1998 to the respondent requesting for the appointment of an independent auditor under s. 53 of the Act. The respondent later decided to investigate her case to ensure that she has good reason for making that application. The objective of the investigation was to check and examine the said trading accounts to ensure that they were in order.

The respondent consequently prepared an investigation report (exh. SS1), dated 8 June 1999, and it, *inter alia*, reads:

Background

5. On 10/12/92, See Choo applied a share margin account with AMIM. The application was approved on 11/12/92 with margin limit of RM200,000.00 where AMIM provided a financing facility to her to purchase securities. The margin limit then was increased to RM2,000,000. Her account number with AMIM was 2000-000886-9. This account was closed by AMIM on 9/1/98 since AMIM did not continue its service in providing financing facility to clients to purchase shares. According to AMIM, all transactions involved in her account were between herself and her remisier in JB Sec. AMIM functions were only to receive the contract notes and prepare a monthly statement for her.

6. At the moment, See Choo has 2 personal trading accounts in JB Sec. ie, 3SE035 (Trading Account) which was opened in March 1993 and 8SE035 (Margin Account) which was opened in 1997. Besides these two accounts, there was another account opened by her where AMIM provided a financing facility for her to purchase shares ie, account no. 2AM033. With regard to this account (2AM033), according to See Choo, all orders were received by her remisier, En. Ahmad Azman Abdul Manaf (Ahmad Azman), the ex-director of JB Sec. who is now an Executive Director at SJ Sec. Sdn. Bhd. For every transaction (buy/sell shares) done by See Choo under the account, contract notes would be sent to AMIM for them to settle. AMIM would settle any purchases done under this account as long as it is within See Choo's loans limit and would reject any contract notes which is over the limit where See Choo had to settle it by herself. See Choo would receive the Statement of Account from both JB Sec. and AMIM every end of the month.

Fact Of Case

7. On 30/12/93, See Choo instructed Ahmad Azman to purchase 200 lots of MFCB shares under her AMIM's account; 2AM033. At the same time, See Choo also gave another instruction to Ahmad Azman to purchase whatever amount under her trading account no. 3SE035. As instructed, Ahmad Azman pruchased 200 lots of MFCB under AMIM's account no. 2AM033 and another 10 lots under trading account no. 3SE055. However, since the purchasing under account no. 2AM033 were above See Choo's loan limit AMIM only settled 50 lots which were within her loan limit and rejected the other 150 lots for See Choo to settle.

8. Upon See Choo's instruction, 50 lots were contra on 5/1/94 and another 50 lots on 10/1/94 with contra gain RM22,927.87 and payment was made to her through AMIM on 14/2/94. The balance of 50 lots which were not settled by AMIM were sold by JB Sec. (force selling) on 19/5/94 (36 lots) and 20/5/94

(14 lots) with contra losses amounting to RM82,084.70 and RM32,770.43 respectively. And the other 50 lots which were settled by AMIM were sold on 20/5/94 with contra loss RM106,547.41. Subsequently, See Choo alleged that she was not aware of the above transactions and alleged that Ahmad Azman did not confirm with her after the shares were purchased on 30/12/93. However, according to Ahmad Azman, he confirmed the transaction with See Choo at the end of the trading day.

The said investigation report then provided the details of the said trading accounts. The finding of the respondent's investigation officer read as follows:

Finding

10. After checking and examined See Choo's trading records ie, documents/ statements from JB Sec. and AMIM, I found that her records with both companies are in order. Records in JB Sec. showed that there was no amendment done by JB Sec. under 'error account' as alleged by See Choo. But there was a mistake done by AMIM for double debits of contra losses, however AMIM had rectified and reimbursed See Choo. I was informed by JB Sec. and AMIM, as well as by See Choo that JB Sec. and AMIM had explained to her about her accounts. I was informed by AMIM the same issue had been brought to court by See Choo together with other disputes.

Recommendation

Investigation revealed that the transactions done by JB Sec. were upon See Choo's instruction and all records pertaining to See Choo's account in JB Sec. and AMIM are in order. There is no evidence/record showed that JB Sec. had amended 50 lots (out of 200 lots) into 'error account'. Therefore, I am of the opinion that See Choo has no good reason to apply for the independent auditor under section 53 SIA 1983.

Consequently by letter dated 19 August 1999 the respondent informed the appellant's solicitors that the appellant's application to appoint an independent auditor under s. 53 of the Act is refused. That letter reads:

Tuan

Permohonan Perlantikan Juruaudit Bebas Di Bawah

Seksyen 53 Akta Perindustrian Sekuriti 1983 ("SIA")

Surat tuan bertarikh 20 Mac 1998 beserta suat-surat lain yang ditujukan kepada pihak kami mengenai perkara di atas dengan ini adalah dirujuk.

Adalah dimaklumkan bahawa Suruhanjaya Sekuriti ("SC") telah menimbangkan permohonan tuan bagi pihak Puan See Choo @ See Guat Kiok di atas perlantikan oleh SC suatu juruaudit bebas bagi tujuan memeriksa akaun-akaun, rekod-rekod dan lain-lain dokumen yang berkaitan JB Securities Sdn Bhd dan Arab-Malaysian Merchant Bank Berhad, sepertimana yang dinyatakan di dalam surat-surat tuan yang dirujuk di atas dan telah membuat keputusan menurut kuasa yang diperuntukkan kepada SC di bawah Seksyen 53 SIA tersebut untuk menolak permohonan tersebut.

Sekian dimaklumkan, terima kasih.

The appellant was displeased upon receiving the above letter. By letter dated 26 August 1999 the appellant' solicitors conveyed to the respondent the appellant's "greatest distress by your arbitrary decision to reject her application without assigning any specific reason thereto". The last paragraph of that letter reads:

TAKE NOTE THAT we are instructed to give you notice which we hereby do that unless you do provide us with your grounds for rejecting our client's application within 7 days from the date hereof you shall be deemed to have improperly and arbitrarily exercised your discretion and we have our client's instructions to institute legal proceedings against you, inter alia, to apply to court for an order of mandamus to compel you to perform your statutory duties whereupon you may be liable to all costs an expenses arising therefrom.

The respondent, by letter dated 7 September 1999, responded as follows:

Tuan,

PERMOHONAN PERLANTIKAN JURUAUDIT BEBAS DI BAWAH SEKSYEN 53 AKTA PERINDUSTRIAN SEKURUTI (SIA) 1983

Dengan hormatnya, izinkan saya merujuk kepada surat tuan bertarikh 26hb Ogos 1999 berkaitan dengan perkara di atas.

Adalah dimaklumkan bahawa telah menjadi satu prosedur bagi Suruhanjaya Sekuriti ("SC") untuk merujuk aduan para pelabur yang melibatkan tatacara urusniaga sekuriti kepada pihak Bursa Saham Kuala Lumpur ("BSKL") untuk diambil tindakan, memandangkan adalah menjadi tanggungjawab langsung BSKL untuk menyiasat dan mengambil tindakan yang bersesuaian menurut peruntukan yang berkenaan di bawah Perauturan Berkaitan Syarikat-Syarikat Ahli BSKL ("Rules Relating To Member Companies).

Seperti yang tuan sedia maklum, SC juga mempunyai kuasa di bawah seksyen 53 SIA 1983 untuk melantik mana-mana orang atau badan yang difikirkan patut dan layak untuk melaksanakan tugas-tugas bagi mengaudit akaun-akaun pelanggan di mana-mana syarikat saham yang berdaftar dan permohonan tuan bagi pihak anakguam tuan, Puan See Choo @ See Guat Kiok adalah secara spesifiknya dilakukan di bawah seksyen ini.

Sehubungan dengan itu, dalam kes anakguam tuan, SC telah terdahulunya mengambil keputusan untuk melantik BSKL di bawah seksyen 53 SIA 1983 bagi menjalankan tugas-tugas pengauditan akaun-akaun anakguam tuan seperti yang telah dijelaskan kepada pihak tuan melalui surat kami yang bertarikh 3hb September, 1998.

Memandangkan anakguam tuan masih tidak bersetuju dengan perlantikan tersebut seperti yang dinyatakan di dalam surat tuan bertarikh 10hb September 1998, SC telah menimbang permohonan tuan untuk perlantikan seseorang juruadit bebas yang lain (Selain daripada BSKL). Bagi tujuan ini, SC perlu terlebih dahulu menjalankan kajian dan soal selidik berhubung dengan permohonan anakguam tuan tersebut (surat dari SC bertarikh 15hb Oktober, 1998 dengan ini adalah berkaitan) untuk menentukan sejauhmanakah keseriusan aduan dan kes anakguam tuan sehingga memerlukan perlantikan juruadit bebas selain daripada BSKL yang merupakan institusi di bawah seliaan SC.

Kajian dan soalselidik yang telah dijalankan oleh pihak SC ini antara lainnya mendapati kedudukan akaun-akaun anakguam tuan adalah di dalam keadaan teratur dan SC berpuashati bahawa urusniaga yang dijalankan di akaun-akaun yang terlibat sepertimana yang diadu oleh anakguam, telah dikendalikan secara biasa.

Menurut seksyen 53(4) SIA, SC tidak boleh melantik juruadit bebas melainkan, antara lainnya, SC berpuashati pemohon mempunyai sebab-sebab yang wajar bagi permohonan tersebut. Oleh yang demikian, berdasarkan penilaian kajian dan soalselidik yang dilakukan, SC telah membuat keputusan bahawa peruntukan seksyen tersebut tidak dipenuhi dan dengan itu menolak permohonan tuan.

Sekian dimaklumkan, terima kasih.

After having obtained leave, by notice of motion dated 28 February 2000, the appellant applied for the following orders:

(a) for the issue of *certiorari* to quash the decision of the respondent in rejecting the appellant's application to appoint an independent auditor to audit the accounts of JBSSB relating to the said trading accounts under section 53 of the Act;

(b) for the issue of mandamus against the respondent to appoint an independent auditor to audit the accounts of JBSSB relating to the said trading accounts under s. 53 of the Act;

(c) that the costs of the application be borne by the respondent; and

(d) any other relief or order as the court deems fit.

The learned judge in the court below dismissed the appellant's application for orders of *certiorari* and *mandamus* and against that decision the appellant appealed to this court. In his grounds of decision, the learned judge said:

> ... I am of the view that there is only one issue central to the present dispute. The issue is whether the appointment of KLSE by the respondent to examine the account of the applicant with AMMB and JBSSB following an application by the applicant is in accordance with section 53 of the Securities Industry Act 1983. If the answer to this question is in the affirmative, the applicant's application should be dismissed; if on the other hand the answer is in the negative then the next issue to be decided by this court is whether the applicant is entitled to the remedies as prayed in paragraphs (a) (b) and (c) of Enclosure 13.

At the end of the day, the learned judge dismissed the application with costs. He said:

> ... it is my considered view that the appointment of KLSE by the respondent to audit the applicant's account with JBSSB is in order and in accordance with section 53 of the SIA 1983. In the circumstances if the applicant is still desirous of pursuing with her application to have her account with JBSSB audited, it is ordered that the respondent do restore the appointment of KLSE made on 29.06.98.

In his submission, learned counsel for the appellant attacked the decision of the learned judge. He contended that the learned judge went about the matter in his own way missing the actual issue before him. He argued that the issue central to the application was whether the decision not to appoint an independent auditor by the respondent ultimately, was a decision in accordance with law or instead one tainted with any of those matters which would render it liable to be set aside by way of judicial review. He insisted that the learned judge erred in law and principle when he refused the appellant's application for *certiorari* and *mandamus*.

In relation to s. 53 of the Act he pointed out that the section gives the respondent the discretion upon receipt of an application in writing the power to appoint an independent auditor or such other person or body of persons to examine, audit and report either generally or in relation to any particular matter upon the books accounts and records and securities held by that relevant person. The respondent did in fact exercise its discretion pursuant to s. 53 of the Act and in no uncertain terms appointed the KLSE to look into the complaint. Having done that, would the respondent be at liberty to later decide to reject the appellant's application for the appointment of an independent auditor? Counsel argued that the respondent could not do so for the following reasons:

(i) the respondent had no jurisdiction to reconsider or reverse its earlier decision to appoint independent auditors pursuant to the provisions under s. 53 of the Act; and

(ii) having appointed the KLSE to make the necessary investigations under s. 53 of the Act, the respondent was caught by the provisions of s. 54 of the same which clearly requires the independent body concerned, and not the respondent, to report in respect of the conclusions of such investigations to the respondent.

Section 54 of the Act entitled "Independent auditor, etc. to report to Commission" reads:

> An independent auditor, person or body of person appointed by the Commission under section 52 or 53 shall, upon the conclusion of the examination and audit in respect of which such auditor, person or body was appointed, make a report to the Commission.

Counsel argued the Act confers upon the independent body and not the respondent the jurisdiction to investigate and make conclusions from such investigations. Once appointed, it is for the independent auditor to carry out the necessary investigation. For this purpose, the powers available to the independent auditor are found in s. 55 of the Act. Upon the conclusion of such an investigation, the independent auditor will report such a conclusion to the respondent pursuant to s. 54 of the Act.

Counsel then canvassed the following points:

(i) the power to conclude upon the investigation, after an appointment is made is vested in the "independent body" and not the respondent;

(ii) the respondent had no jurisdiction to reject the application of the appellant under s. 53 of the Act as it had earlier exercised its discretion to appoint "independent auditors" pursuant to same;

(iii) having decided earlier to appoint "independent auditors", the respondent was therefore satisfied that the appellant had good reason to make the application;

(iv) having been so satisfied, it was unreasonable, improper and beyond comprehension as to why and as to how the respondent could suddenly find a change in mind;

(v) the respondent was not entitled to adjudicate upon the complaint of the appellant, a matter which by operation of law, *viz.*, s. 54 of the Act, had by then become vested in the "independent body" instead;

(vi) the learned judge erred in law and in principle when he refused the appellant's application for an order of *certiorari* and *mandamus.*

In his submission, learned counsel for the respondent submitted that the learned judge was correct in law in identifying that the central issue was whether the appointment of the KLSE by the respondent to audit the said trading accounts was in accordance with s. 53 of the Act and if it did, the appellant's application for judicial review by way of *certiorari* and *mandamus* was to be dismissed. He then stressed that the learned judge was correct in law in holding that the respondent's appointment of the KLSE was in accord with s. 53 of the Act and in subsequently restoring the respondent's appointment of the KLSE made on 29 June 1998 if the appellant was still desirous of pursuing with her application to have the said trading accounts audited.

Counsel submitted that the learned judge committed no error of law in his interpretation of the phrase "such other person or body of persons" in s. 53 of the Act by applying the "plain meaning rule". The learned judge was correct in law in holding that the appointment of the KLSE by the respondent was not caught by s. 48A of the Act.

Section 48A of the Act entitled "Associates not to be appointed as auditors" reads:

> A relevant person shall not appoint a person who is an associate of the relevant person as an auditor of any of its accounts.

Counsel argued the learned judge was correct in law and in fact to reject the appellant's application for judicial review by way of *certiorari* and *mandamus.* In any event, from the circumstances of the case, the appellant should be denied the remedies of judicial review for the following grounds:

(i) in the appellant's application for leave for *certiorari* and *mandamus*, the appellant never disclosed that she had exercised her private law remedies against both JBSSB and AMIM *vide* Johor Bahru High Court Civil Suit No: 24-43-1996 and Johor Bahru High Court Originating Summons No: 24-1961-1999; this amounts to a concealment or suppression of material facts as the granting of the remedy of judicial review is discretionary; further, the pursuit of her private law remedies will be equally effective in achieving the results the appellant desires;

(ii) that after the respondent had appointed the KLSE to audit her accounts, there was no legal basis for the appellant to reject that appointment and insist on an independent auditor be appointed instead;

(iii) that subsequent to the appellant's rejection of the KLSE the respondent had acted fairly and reasonably towards the appellant; the respondent had observed procedural fairness in that after the appellant objected to the appointment of the KLSE, the respondent carried out its own investigation to determine the merits of the appellant's complaint;

(iv) in its investigation, the respondent had acted fairly in that all relevant documents in connection with the said trading accounts were considered; the relevant persons of both JBSSB and AMIM were interviewed; the appellant herself was also interviewed and she was given the opportunity of raising all her complaints;

(v) all her complaints that were raised in her letter to the respondent dated 20 March 1998 were investigated upon by the respondent and its findings contained in the investigation report (exh. SS1);

(vi) the main complaints were summarised and prepared for consideration of the respondent's Board of Commissioners; the Board then considered the relevant factors and eventually decided that the appellant did not meet the "good reason test" under s. 53(4) of the Act;

(vii) the respondent made full and frank disclosures to the appellant in relation to its process of investigation leading to the reasons for the respondent's rejection of the appellant's application;

(viii) the respondent has acted fairly throughout towards the appellant.

In conclusion, the respondent's counsel submitted that although the appellant may not agree with the findings of the investigation report prepared by the respondent (exh. SS1), it must be appreciated that all complaints raised were investigated where all relevant factors were considered, that the appellant was given an opportunity of being heard, that there was complete openness on the part of the respondent and as such the respondent's decision to reject the appellant's application after a thorough investigation cannot be said to belong to the class of decisions that suffer from "Wednesbury unreasonableness" in that it was "illegal", "irrational", "unreasonable" or "procedurally unfair".

We note that the respondent was established by the Securities Commission Act 1993 and s. 3 of the same reads:

There is hereby established a body corporate by the name of "Securities Commission" with perpetual succession and a common seal, and which may sue and be sued in its corporate name ... .

Section 15 of the Securities Commission Act 1993 provides the functions of the respondent which includes regulating all matters relating to securities and futures contracts, to be responsible for supervising and monitoring activities of any exchange, clearing house and central depository and to promote and encourage proper conduct amongst members of the exchanges, clearing houses, central depository and all licensed persons.

The facts showed that the appellant's application to the respondent was made *vide* letter dated 20 March 1998 wherein she requested the respondent to appoint an independent auditor under s. 53 of the Act to audit the said trading accounts. JBSSB, a stockbroking company and a "dealer" would fall within the contemplation of the words "relevant person" found in s. 53 of the Act. AMIM being a merchant bank, in our view, do not fall within the purview of the words "relevant person".

In her application, the appellant specifically requested that "an independent auditor" be appointed. It is not disputed that her application for such an appointment, which contained particulars of the transactions she conducted under the said trading accounts and which she claimed to be "irregular", was not then verified by a statutory declaration sworn by her goodself, which is a mandatory requirement under s. 53(4) of the Act. That would make her application incomplete. Notwithstanding that, the respondent nevertheless requested the KLSE to audit the said trading accounts and to report the results to the respondent.

The appellant was very unhappy and her solicitors wrote several letters to the respondent objecting to the appointment of the KLSE. The objections canvassed in the appellant's letters included the following:

(i) that appointing the KLSE as an independent auditor for the said purpose would "greatly prejudice" the appellant as the KLSE cannot be regarded as an independent auditor;

(ii) that the KLSE is not qualified to be an independent auditor under s. 53 of the Act;

(iii) that the KLSE "shall not and cannot be regarded as an independent auditor;

(iv) that the KLSE shall not be considered as an "auditor" defined under the Act and s. 2 of the Act provides that "auditor" means "an approved company auditor within the meaning of the Companies Act 1965".

In their letter dated 26 August 1998 the appellant's solicitors threatened to report the matter to the Ministry of Finance unless the respondent exercised its authority to appoint an independent auditor for the said purpose.

In its reply to the above letter, the respondent pointed out it is empowered under s. 53 of the Act to appoint:

(i) an independent auditor; or

(ii) such other person; or

(iii) body of persons,

as it may decide to undertake the task at hand. It has appointed the KLSE which would fall within the contemplation of the words "such other person" or "body of persons". In the same reply, the respondent requested the appellant to forward a statutory declaration as required under s. 53(3) of the Act "to assist the KLSE in this matter". The appellant forwarded the statutory declaration as requested but reiterated her reservations about the appointment of the KLSE to carry out the task and insisted that an independent auditor be appointed.

Be that as it may, the respondent then informed the appellant that they will conduct an investigation on the complaint to verify as to whether the appellant has good reason for making the application as required under s. 53(4) of the Act. In the course of its investigation, the respondent found that the transactions carried out under the said trading accounts were in order. The respondent also discovered that the brunt of the complaint centered around contra losses incurred by the appellant and her claim that she was not aware of the transactions carried out by her remisier under the said trading accounts. The investigation report showed that her remisier, who was interviewed by the respondent, confirmed the transactions with the appellant at the end of the trading day. The respondent then informed the appellant that her application for the appointment of an independent auditor to audit the said trading accounts is refused. The appellant immediately threatened legal action unless the grounds for rejecting the application are provided.

The respondent by letter dated 7 September 1999 explained as the appellant had insisted that an independent auditor be appointed to undertake the task and not the KLSE, it has to satisfy itself as to whether the appellant has good reason for making the application, as provided under s. 53(4) of the Act, for the appointment of an independent auditor. As its own investigation showed that the transactions carried under the said trading accounts were in order, it has decided to reject the appellant's application that an independent auditor be appointed to carry out the audit.

The learned judge was of the view that the appointment of the KLSE by the respondent to audit the said trading accounts is in order and in accordance with s. 53 of the Act. We agree. Section 53(1) of the Act clearly provides that the respondent is empowered to appoint "an independent auditor" or "such other person" or "body of persons" as the respondent may decide. The KLSE certainly falls within the contemplation of the words "such other person". The word "or" appearing in s. 53(1) denotes that those words have to be read disjunctively. The learned judge has extensively dealt with this issue in his grounds of decision; he said:

> From the submission by both parties it is apparent that parties have diverse opinion on the intention of the legislature with regard to the use of the phrase "or such other person or body of persons". As I have stated earlier on counsel for the applicant argued that "such other person or body of persons" is within the same genus of "independent auditor" and must therefore be taken to mean the same category of people.
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> With respect I cannot countenance this argument. It must be noted that who is an 'auditor' in the context of section 53 of the SIA is specifically defined in section 2. Section 2 in turn says that "auditor" means a approved company auditor within the meaning of the Companies Act 1965.
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> With this definition in mind let us now look at the other category of person or persons whom the Security Commission can appoint under section 53.
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> Unlike the word 'auditor' there is no specific or statutory definition with regard to alternative class of person or body of persons who the respondent can alternatively appoint. This scenario to my mind is a clear pointer that the legislature had intended to have two or more categories of people who can be appointed to carry out the task under section 53.
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> It is my view that if any particular word or phrase found in a statute is intended to have or carry special meaning as oppose to its ordinary, plain and natural meaning, then the logical thing for the legislature to do is to specifically and statutorily define such word or phrase in the statute in question as they have done to the word "auditor" in the SIA 1965; otherwise "plain meaning rule" should apply.
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> In the case of *Sussex (Peerage) Case* [1844] II CI & Fin 85, Tindal CJ had this to say:
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> > If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in that natural and ordinary sense ... but if any doubt arises from the terms employed by the legislature, it has always been held a safe means of collecting that intention to call in aid the ground and cause of the making of the statute.

In applying what is known as the "plain meaning rule" we have to consider not what the Act ought to have said, but what it does say. In *H Rubber Estate Bhd v. Director of Inland Revenue* [1979] 1 MLJ 115, Gill CJ (Malaya) said:

> ... the universal rule in construing statutes, as in construing all other written instruments, is that the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument ...

Reading straight into section 53 of the SIA I see no plausible reason for anyone to divert from the plain and ordinary meaning attached to the words and phrase found in the section of the law.

The meaning of the words used in section 53 is just what it says. It is wrong for anyone to say that there is a latent meaning to the phrase in question. It is my view that such phrase should not be interpreted narrowly and restrictively as it is plain and obvious that the legislature had intended to have alternative and wider spectrum and category of persons who can be appointed to do the job in question. I can't agree more with counsel for the respondent that if the interpretation of the applicant's counsel were to be accepted and adopted then the presence of the phrase in question would be superfluous and redundant. The word "auditor" the meaning of which is found in section 8 of the Companies Act 1967 would be sufficient to exclude person or body of persons from coming into the ambit of section 8.

The facts clearly showed that the appellant has insisted at the outset and throughout that the respondent must appoint an independent auditor. We do not think that she can dictate terms to the respondent as to the appointment. The appellant's counsel has argued that the respondent had earlier exercised its discretion by appointing the KLSE and hence was not in a position to later reject the application to appoint an "independent auditor". He went on to argue that the respondent has no jurisdiction to reconsider or reverse its earlier decision to appoint "independent auditors" pursuant to the provisions of s. 53 of the Act.

We do think that the term "an independent auditor" can be used interchangeably with the terms "such other person" or "body of persons" in the context of the submissions made above. An "auditor" cannot be equated with the words "or such other person" or "body of persons". The respondent decided to appoint the KLSE and not "an independent auditor" and the appellant had protested to such an appointment. The facts showed that the respondent did not at any time made a decision to appoint "independent auditors" as contended by the appellant's counsel and hence there is no question of the respondent having no jurisdiction to reconsider or reverse its earlier decision. That question do not arise at all.

We also find no merits in the argument of the appellant that having appointed the KLSE to carry out the audit, the respondent was caught by s. 54 of the Act. How can that be so? The respondent appointed the KLSE notwithstanding that s. 53(3) of the Act had not been complied with at the material time. The appellant incessantly intimated that she disagreed with the appointment of the KLSE and insisted throughout that the respondent must appoint an independent auditor. She even threatened to report the matter to the Ministry of Finance if the respondent did not do so. As a consequence of all that, the respondent requested that she forward a statutory declaration as required under s. 53(3) of the Act. In that statutory declaration and also her solicitors' covering letter, the appellant again specifically requested for the appointment of an independent auditor. Upon receipt of the letter and statutory declaration, the respondent, pursuant to s. 53(4) of the Act carried out an investigation to satisfy itself that there is good reason to allow the appellant's application. On this course of action, the appellant's counsel argued that the Act confers upon "the independent body" and not the respondent the jurisdiction to investigate and make conclusions from such investigation. We cannot fathom this argument. Section 53(4) provides the respondent shall not, *inter alia*, appoint an independent auditor unless it is satisfied that an applicant has good reason for making the application. It is our view that the only way the respondent can comply with s. 53(4) is to verify the application by making its own inquiries relating to the said trading accounts and the "irregular" transactions complained of. The respondent has done just that and had even interviewed JBSSB and the appellant. It then came to the conclusion that all records relating to the said trading accounts were in order and that there was no good reason to allow the application by the appellant to appoint an independent auditor. That being the scenario, we cannot comprehend how it can be argued that the respondent was caught by s. 54 of the Act. Section 54 provides, *inter alia*, that an independent auditor appointed by the respondent shall upon the conclusion of the examination and audit make a report to the respondent. The respondent carried out its own "investigation" to satisfy itself of the veracity of the application for an independent auditor to be appointed. It did not carry out an audit. As such, we cannot see the relevance of s. 54 of the Act coming into play here.

The above was the scenario that brought about this application for orders of *certiorari* and *mandamus*, *viz.*, the appellant has sought judicial review to impugn the decision of the respondent in rejecting the appellant's application to appoint "an independent auditor". In *R Rama Chandran v. The Industrial Court of Malaysia* [1997] 1 CLJ 147, Edgar Joseph Jr FCJ said "Judicial review is a discretionary jurisdiction".

The remedy by way of *certiorari* is an extraordinary jurisdiction and a discretionary remedy with the High Court. In his book entitled *"Administrative Law of Malaysia and Singapore"*, Professor M.P. Jain made the following observations:

(i) *certiorari* has emerged into a general remedy for the control of decisions by the administration affecting the rights of the people;

(ii) *certiorari* is issued when the body in question has completed its work, disposed of the matter and given its determination; *certiorari* is thus issued to quash such a determination;

(iii) *certiorari* is issued when an adjudicatory body has infringed norms of natural justice, or acts under an invalid law, or commits errors of jurisdiction, or there is an error of law apparent on the face of the record, or where its decision is based on findings of fact for which there is no legal evidence in support.

In *Non-Metallic Mineral Products Manufacturing Employees Union & Ors v. South East Asia Fire Bricks Sdn Bhd* [1976] 2 MLJ 67 Raja Azlan Shah FCJ (as he then was) said (at p. 68):

> The jurisdiction of the High Court to issue orders of *certiorari* is neither an appellate nor a revisional jurisdiction. Also from the very nature of the power conferred under section 25 of the Courts of Judicature Act, 1964, it is clear that in exercise of this power the High Court exercised original jurisdiction. This jurisdiction stems from the prerogative jurisdiction inherited from the United Kingdom courts and its object is mainly to enable the superior courts to keep inferior tribunals within the bounds of their authority. The supervisory character is essential for always in the background there is the beguiling illusion that an inferior tribunal entrusted to hand down awards of a final nature may hand down awards as it likes. Therefore the jurisdiction may for convenience be described as an extraordinary original jurisdiction.

In *R Rama Chandran v. The Industrial Court of Malaysia, supra,* Edgar Joseph Jr FCJ said:

> It is often said that Judicial Review is concerned not with the decision but the decision making process. (See eg *Chief Constable of North Wales Police v. Evans* [1982] 1 WLR 1155). This proposition, at full face value, may well convey the impression that the jurisdiction of the courts in Judicial Review proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to which he has been subjected. Put differently, in the words of Lord Diplock in *Council of Civil Service Unions & Ors v. Minister for the Civil Service* [1985] AC 374, where the impugned decision is flawed on the ground of procedural impropriety.

But Lord Diplock's other grounds for impugning a decision susceptible to Judicial Review make it abundantly clear that such a decision is also open to challenge on grounds of 'illegality' and 'irrationality' and, in practice, this permits the courts to scrutinize such decisions not only for process, but also for substance.

In this context, it is useful to note how Lord Diplock (at pp. 401-411) defined the three grounds of review, to wit, (i) illegality, (ii) irrationality, and (iii) procedural impropriety. This is how he put it:

> By 'illegality' as a ground for Judicial Review I mean that the decision maker must understand directly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of a dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see *Associated Provincial Picture Houses Ltd v. Wednesbury Corp* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the courts' exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v. Bairstow* [1956] AC 14, of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though undefinable mistake of law by the decision maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failing to act with procedural fairness towards the person who will affected by the decision. This is because susceptibility to Judicial Review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

In his book, in relation to mandamus, Professor M.P. Jain observed as follows:

> The order of *mandamus* is a command issued by the High Court asking an authority to perform a public duty imposed upon it by law. ... *Mandamus* can be issued to any type of body, quasi-judicial, legislative, administrative and in respect of any type of function. *Mandamus* can be granted only when a legal duty is imposed on an authority and the applicant has a legal right to compel

> the performance of the public duty prescribed by law, and to keep the subordinate bodies and officers exercising public functions within the limits of their jurisdiction. ... *Mandamus* is thus a very wide remedy which is available against a public officer to see that he does his duty.
>
> What can be enforced through *mandamus* is a duty of a public nature, the performance of which is imperative and not optional or discretionary with the authority concerned. Thus, if an officer has power rather than a duty, and if he does not use his power, *mandamus* cannot be issued.

In *Michael Lee Fook Wah v. Minister of Human Resources Malaysia & Anor* [1998] 1 CLJ 227, the Director General of Industrial Relations decided under s. 20(3) of the Industrial Relations Act 1967 that the appellant's complaint was not fit to be referred to the Industrial Court. The appellant made an application to the High Court against the Minister of Human Resources for orders of *certiorari* and *mandamus*. The High Court dismissed the application and the appellant appealed to this court. In dismissing the appeal, Shaikh Daud JCA said (at p. 232):

> First and foremost, it must be emphasized that in an application for *certiorari*, the High Court is not sitting in its appellate jurisdiction but in its supervisory jurisdiction. The court is more concerned with the decision-making process and not the decision itself. The court should not readily question the administrative decision of the first respondent as that is his absolute discretion. If the first respondent has acted *ultra vires*, unfairly or unjustly in exercising his discretion, then it is the duty of the courts to interfere in an application for review of that decision. The underlying principles of judicial review have been stated in a number of cases, and it is the exercise by those with whom discretionary power is vested, not in the courts, that the courts are required to review.

At p. 232, Shaik Daud JCA continued as follows:

> It was also argued before us that when all the materials are before the first respondent, it was his duty to refer the complaint to the Industrial Court and not usurp the function of that court by making his own decision thereon.
>
> With respect, this line of argument seems to suggest that the first respondent is required to refer every complaint referred to him, to the Industrial Court, irrespective of whether it is a fit and proper case to do so. The law does not require the first respondent to do this, otherwise the position of the frst respondent *vis-a-vis* the Act would be that of an intermediary or a mere postman. It is not a mechanical exercise for the first respondent in every case to refer to the Industrial Court. Section 20(3) of the Act provides that '... the Minister may, if he thinks fit, refer the representation to the Court for an award'.

> From this, it can be seen that s. 20(3) of the Act confers a discretion on the first respondent as to whether or not to refer any particular representation. Whether a reference is made must, therefore, depend on the facts and circumstances of each particular case. The court will only interfere when there is evidence to show that the discretion was exercised unlawfully.

And, later, at p. 234 said:

> An exercise of a discretion does not always mean that it should be exercised in a positive manner. A negative act, as in the present case, is equally an exercise of a discretion, provided the Minister has considered every aspect of the case. On the facts and circumstances of the present case we are satisfied that the Minister had exercised his discretion in a manner which was in accord with the scheme and intention of the Act, as and such the court should not interfere.

We cannot find where the learned judge in the court below went wrong in exercising his discretion and in making the decision that he did. The KLSE at that material time was a company limited by guarantee and its members are licenced stockbroking companies. The "Committee" of the KLSE has all the rights, powers and privileges conferred on directors under the Companies Act 1965. Section 53 of the Act allows the appointment of a body such as the KLSE. The KLSE, a stock exchange, earlier came under the purview of the Securities Industry Act 1973 which has since been repealed by the Act. Section 6 of the repealed Act and now s. 8 of the Act provides that the Minister may approve a body corporate as a stock exchange if he is satisfied, *inter alia*, that the rules of the body make satisfactory provision for "the expulsion, suspension or disciplining of members for conduct inconsistent with just and equitable principles in the transaction of business or for a contravention of or failure to comply with the rules of the stock exchange or the provisions of this Act" and "generally for the carrying on of the business of the stock exchange with due regard to the interests of the public". Section 9B(1) of the Act provides that it shall be the duty of the stock exchange to ensure an orderly and fair market in the securities that are traded through its facilities. Section 9B(3) provides that it shall be the duty of the stock exchange to ensure, *inter alia*, that its members comply with the rules of the stock exchange that apply to such members.

The respondent decided to appoint the KLSE to undertake the task at hand but that appointment was objected to by the appellant. We wonder why.

We would think that the KLSE would be the best person to be appointed under s. 53 of the Act to examine and audit the said trading accounts and report to the respondent. Article 1(g) of the articles of association of the KLSE at the

material time provides a "member company" means "a company which carries on a business of dealing in securities and is recognised as a Member company by the Exchange". Rule 13A of the KLSE "Rules Relating To Member Companies" ("the Rules") which is entitled "Complaints by non-members", *inter alia*, reads:

> (1) In the event of any complaint by non-member against a Member company in respect of transactions in securities, the Committee shall consider in the first instance whether to act on such complaint.
>
> If the Committee decides to act, the complainant shall pay sum of M$100 to the General Manager of the Exchange prior to the case being heard.
>
> (2) Thereupon the Committee shall investigate and adjudicate upon such complaint, and the Member company against which the complaint is made shall be bound to submit to the jurisdiction of the Committee, whose decision shall be final and binding against it and against a non-member so complaining.

Rule 15A of the Rules which is entitled "Supply of information to and investigation by the committee", *inter alia*, reads:

> (1) The Committee is empowered to:
>
> (i) require any Member company to give any information as may be in its possession relating to any matter under investigation by the Committee and every Member company shall ensure that all such requirements are met promptly and complied with and that the information asked for is made available promptly and such information is confidential to the Committee unless the Committee considers in its absolute discretion that such information or any part thereof shall not be confidential;
>
> (ii) require any Member company to furnish any particulars and to produce for its inspection all books, letters, telegrams or copies thereof and any other documents or information in its possession relating to any matter under investigation by the Committee and such Member company shall without delay ensure that such particulars are furnished and other materials as aforesaid is produced accordingly; and
>
> (iii) investigate the accounts and affairs of any Member company wherever in its opinion such action appears warranted.
>
> (2) The Committee may delegate all or any of the powers vested in it under paragraph (1) of this Rule to a qualified accountant and/or its solicitors or legal advisor and the qualified accountant and its solicitors and legal advisor as the case may be shall report the results of an investigation to the Committee.

Rule 15A of the Rules also provides that the Committee may either suspend the Member company concerned or take over the control and management of the said Member company.

The argument canvassed by the appellant that the respondent has no jurisdiction to reconsider its earlier decision to appoint "independent auditors" cannot hold water. The respondent never appointed "an independent auditor" at any time. As discussed earlier, we are of the view that the terms "an independent auditor" or "such other person" or "body of persons" cannot be used interchangeably from our reading of s. 53 of the Act. Similarly, we see no merits in the argument canvassed by the appellant that having decided earlier to appoint "independent auditors" the respondent was satisfied that the appellant had good reason to make the application. No such thing happened. Further, we also see no merits in the argument canvassed by the appellant that the respondent was not entitled to adjudicate upon the matter as by then it has been vested in "the independent body".

The respondent has exercised its discretionary power. We find that it has acted *bona fide*, fairly and honestly. On the whole, we are of the view there were no grounds of review upon which the learned judge could have granted the order of *certiorari* applied for. There was nothing wrong or illegal or irrational with the decision making process of the respondent neither can we find any procedural impropriety. In relation to the order of *mandamus* applied for, we also cannot see any grounds of review upon which the learned judge could have granted the order. The court must be satisfied that the appellant has a right to the performance of a duty under the Act by the respondent. From our reading of s. 53 of the Act, we find it is not obligatory on the part of the respondent to appoint an independent auditor upon receipt of an application. It has to be satisfied that the applicant has good reason for making the application. In the instant case, after conducting a thorough investigation, the respondent was satisfied that the reason given was not good enough to accede to the appellant's application for an appointment of an independent auditor. The appellant has not shown that the respondent has acted *mala fide* or in any way abused this discretionary power. The respondent has power but was under no duty to appoint an independent auditor. It has declined to do so. There is nothing to show that it has acted improperly or in any unauthorised manner and for that reason, *mandamus* cannot be issued. Under the circumstances, we are satisfied that the respondent has exercised its discretion in a manner which was in accord with the intention of the Act.

We also note that the appellant have other specific and adequate legal remedy in pursuing the matter. In his submission, the respondent's counsel pointed out that the appellant has filed two suits against both JBSSB and AMIM in the Johor Bahru High Court but never disclosed this when she applied for leave. We would agree with counsel that the pursuit of her private law remedies will be equally effective in achieving the results that she desires.

Incidentally, one of the issues canvassed by the appellant's counsel before the learned judge was in relation to s. 48A of the Act. Section 48A provides "a relevant person shall not appoint a person who is an associate of the relevant person as an auditor of any of its accounts". We cannot see the relevance of s. 48A here. Under s. 53 of the Act the respondent is in a position to appoint the KLSE. Section 48A of the Act talks about "a relevant person" and s. 48(1) of the same provides a reference to "a relevant person" in this Division shall be construed as a reference to a dealer, a fund manager, a stock exchange or a recognised clearing house. The respondent do not all fall within the contemplation of the words "a relevant person" and neither can the KLSE be considered "an associate" of the respondent. The learned judge noted that s. 3 of the Act sets out the instances or circumstances where a person or persons are considered as an associate of the relevant person within the context of s. 48A. We do not see any reason why we should delve further on this argument canvassed by the appellant's counsel in relation to this as it is a non-issue.

We find that the learned judge was right in declining to exercise his discretion to make the orders of *certiorari* and *mandamus* and as such we dismiss this appeal with costs. We would however set aside that part of the order of the learned judge which reads "In the circumstances if the applicant is still desirous of pursuing with her application to have her account with JBSSB audited, it is ordered that the respondent do restore the appointment of KLSE made on 29 June 1998". The motion revealed that that order was never prayed for. We would also order that the deposit be paid to the respondent towards the account of taxed costs.